

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**MARCH 19, 1997**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-2601**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**COUNTY OF WALWORTH,**

**Plaintiff-Respondent,**

**v.**

**ROBERT G. LIDEN,**

**Defendant-Appellant.**

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APPEAL from a judgment of the circuit court for Walworth County:  
JOHN R. RACE, Judge. *Affirmed.*

ANDERSON, J. Robert G. Liden appeals a conviction for operating a vehicle while intoxicated pursuant to § 346.63(1)(a), STATS., and operating a motor vehicle with a prohibited blood alcohol concentration. On appeal, Liden argues that the police officer lacked probable cause to find that he was operating under the influence of intoxicants. Liden also argues that the officer failed to observe him for twenty minutes pursuant to WIS. ADM. CODE § TRANS 311.06(3)(a). Because we find probable cause existed and that Liden was observed for the required time, we affirm.

On April 14, 1996, Deputy Robert Wierenga, while patrolling on State Highway 14, observed a truck cross the center lane and drift back into its own lane of traffic. The truck again drifted over the center line, came back into its lane of traffic and continued to drift until the right front and rear tires hit the white fogline. Wierenga next observed the truck make a right-hand turn onto the entrance ramp of Interstate 43 and in doing so crossed over the right-hand turn lane to complete the turn. At this point, Wierenga stopped the truck and identified the driver as Liden. Liden stated that he had several drinks between 9:00 p.m. and 1:00 a.m.

At trial, Wierenga testified that he asked Liden to perform three field sobriety tests: the balance test, the finger-to-nose test and the heel-to-toe test. In all three tests, Liden failed to follow instructions by starting the test prior to the completion of Wierenga's instructions. In Wierenga's opinion, Liden also failed the heel-to-toe test. Consequently, Wierenga placed Liden in the front seat of his car to take him to the police station for an Intoxilyzer test, at which time Wierenga smelled intoxicants on Liden's breath. The test results revealed a blood alcohol concentration of 0.12% and 0.11%. Liden was issued citations for operating a motor vehicle with a prohibited blood alcohol concentration and operating under the influence of intoxicants. The trial court suspended Liden's license for six months, fined him \$564.50 and ordered him to complete ten hours of community service. Liden appeals.

On appeal, Liden argues that Wierenga lacked probable cause for the arrest because he only failed one of the three field sobriety tests. The determination of probable cause to arrest is based on the facts of each case and is a question of law which we review independently of the trial court. *See State v. Truax*, 151 Wis.2d 354, 360, 444 N.W.2d 432, 435 (Ct. App. 1989). Probable cause refers to evidence which would lead a reasonable police officer under the totality of the circumstances to believe the defendant was operating a motor vehicle while under the influence of an intoxicant. *See State v.*

*Nordness*, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). The evidence need not show guilt beyond a reasonable doubt, nor even prove that guilt is more probable than not; the information need only lead a reasonable officer to believe that guilt was more than a possibility. See *Truax*, 151 Wis.2d at 359-60, 444 N.W.2d at 435. The field sobriety tests performed by a defendant are only a factor in considering the totality of the circumstances surrounding the arrest. See *State v. Wille*, 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994) (noting that an officer is not required to perform a field sobriety test before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant). In this case, the additional factors included the lane deviation, the admission of drinking alcohol and the odor of intoxicants.

We conclude that Wierenga's actions were reasonable. The situation and observations before Wierenga included: (1) Liden deviated from his lane of traffic, (2) Liden admitted that he had been drinking, (3) Liden failed to follow the instructions of each field sobriety test, (4) Wierenga smelled the odor of intoxicants and (5) Liden specifically failed the heel-to-toe test. Under the totality of the circumstances, we find that probable cause existed for Liden's arrest.

We further conclude that the twenty-minute observation period required by WIS. ADM. CODE § TRANS 311.06(3)(a) was satisfied. Liden was arrested around 2:55 a.m. and then transported to the police station. Wierenga testified that during the transport, Liden remained in the front seat of Wierenga's car and within his observation. Wierenga further stated that once they arrived at the police station, he read Liden the Informing the Accused form and Liden was kept under observation from 3:05 a.m. until the first Intoxilyzer test was administered at 3:43 a.m. At no time during Wierenga's observation did Liden regurgitate, smoke, eat or drink anything. Wierenga observed Liden for approximately forty minutes before Liden registered his first BAC of 0.12%.

We conclude that Wierenga's observation of Liden complied with the requirements of Wis. ADM. CODE § TRANS 311.06(3)(a).

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

